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IN THE
COURT OF APPEALS OF INDIANA

KELLIE J. MENG,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0608-CV-636
	)	
JAMES W. MENG,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria M. Ransburger, Temporary Judge
Cause No. 49D07-0002-DR-238

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kellie Meng ("Mother") appeals the transfer of physical custody of her children to her former husband, James Meng ("Father"). She argues the trial court abused its discretion in relying on a custody evaluation and recommendation because it was made by a "social worker." The trial court did not abuse its discretion in determining the custody evaluator was an expert and qualified to give opinion testimony. Mother asserts the evaluation was biased because Father's counsel communicated with the custody evaluator. The custody evaluator denied using counsel's letters as an outline for her report, and the trial court found her report and her testimony credible. We decline to judge the custody evaluator's credibility or reweigh the evidence in her report. Mother also argues the trial court abused its discretion when it modified custody because it did not specify which statutory factor or factors had changed. The trial court considered the required factors and entered an appropriate order.

We affirm.

FACTS AND PROCEDURAL HISTORY

The parties married in September 1988 and divorced in June 2001. Two children were born to the marriage: J.A.M., a son born on December 31, 1992, and E.R.M., a daughter born on October 24, 1994. Following the divorce, the parties had joint legal custody of the children and Mother had primary physical custody.

In January 2005, Father filed a verified petition to modify custody. Over Mother's objection, Joyce Lowry performed a custody evaluation. At Mother's request, Dr. Richard Lawlor performed a second custody evaluation. After various evidentiary hearings, the trial court entered the following relevant findings and conclusions:

FINDINGS OF FACT

* * * * *

8. Mother began dating William Trieloff, a married man 20 years her senior, in late 2003. Mother quickly set up a household with Trieloff who remains married to his wife of over 38 years; [sic] although a divorce proceeding is pending. Very soon after, the shared parenting time that the parents had each enjoyed changed dramatically. Mother with the cooperation of Trieloff and her family members consistently attempted to alienate the children from Father by acts and communications including disparaging Father to the children and to others; not giving him timely notice and many times gave him no notice, of the children's activities; making unilateral decisions concerning the children that the Father should have had input on, and consistently diminishing the Father's role as the children's other parent.

* * * * *

11. The Court finds that Dr. Richard Lawlor did not make a specific recommendation about the custody of the minor children, and in fact in his written report and again by way of his testimony, stated that he could not find anything wrong with the recommendations that were made by Joyce Lowry. He saw each parent as about equally positioned in terms of their mixtures of positive and negative personality characteristics. He did opine that if the court found that [Mother's] consistent attempts over the years to alienate the children from their father is the primary issue, then the children should live with [Father] and custody should change. However, Dr. Lawlor also referenced [Father's] chronic harassment and denigration of [M]other as potentially allowing [Father] to become the alienating parent if custody is modified. Dr. Lawlor reviewed the psychological testing for both parents. Although he found elevated scaled [sic] for Father and noted that he may be both passive-aggressive and extrapunitive, he did not see that a psychiatric diagnosis was warranted. However, Lawlor's characterization of [Mother's] results was more guarded. He found that the testing indicated that [Mother] is extremely defensive and that although she also did not warrant a psychiatric diagnosis, he found significant personality traits, such as tending to be immature and narcissistic. Of particular importance to the Court is his discussion of egocentrism and how periods of acting out may be followed by temporary remorse and guilt, but that individuals with this pattern would be likely to repeat similar episodes. The Court heard testimony over the several days of repeated episodes of [Mother] "forgetting" [Father's] phone numbers or contact information for

school records, not thinking that "first right of refusal" meant that she should offer [Father] parenting time when she would be away, and disjointed efforts at notifying him of activity schedules or changes.

12. In comparing the evaluations and testimony of the experts, the Court notes that Joyce Lowry and Elaine Smith did a much more comprehensive and detailed evaluation. Dr. Lawlor served as a second opinion. His evaluations do not include a home study and in this case, he did not dispute findings made by Joyce Lowry. . . . .

13. The Court FINDS that there has been a substantial and continuing change of circumstances and that the original custody order is no longer in the children's best interest. This finding is supported by Joyce Lowry's written report, her extensive testimony, by parts of Dr. Richard Lawlor's report and his testimony when he testified that the Mother had demonstrated a clear pattern of alienation, by the testimony of the parties, their witnesses, and by the many exhibits introduced into evidence. During the cross examination of Joyce Lowry, she listed a number of events that constituted a substantial and continuing change in circumstances that included: Introducing William Trieloff into the household and with his assistance began a pattern of trying to alienate the children from the Father; Mother's failure to include the Father in making important children related decisions; telling the children not to tell their Father about certain events such as Mother's trips to New York and to Cancun, thereby using them as go betweens and placing them in the position of having to lie to Father; not giving Father any notice of many of the children's school and non-school activities and/or giving him late information whereby he could not make plans to participate such as the Bradford Woods trip that William Trieloff took with [J.A.M.] instead of Father and a 'father-daughter' dance attended by William Trieloff rather than Father. In addition, the Mother's financial situation has become more unstable which is not in the children's best interest. She testified that she had to go through bankruptcy after the dissolution because she could not pay the mortgage payment on the home that was awarded to her and because of other debts. However, the testimony showed that the Mother is now obligated to pay a mortgage payment that is higher than her previous payment, for a home that was purchased just in William Trieloff's name for which she took in excess of $18,000.00 from her IRA for the down payment. Mother has to pay that mortgage payment because Mr. Trieloff is not employed having lost his job several months ago. In addition, Mr. Trieloff is still legally married and his wife of thirty-eight (38) years likely has a claim for part of the equity

that is in the home because Trieloff testified that he cashed in a life insurance policy, likely a marital asset subject to division, to contribute to the home's down payment. If Trieloff does not have the cash to pay his wife for her share in that equity, then he could be forced to sell the home, adversely affecting the children's stability and security. Also, testimony and exhibits demonstrate that the Mother named William Trieloff, not her children [J.A.M. and E.R.M.], as beneficiary of the life insurance policy that she obtained when she was working for the Indianapolis Motor Speedway. Joyce Lowry found that Father and his wife Pam are both gainfully employed, Father working for IPL for the last seventeen (17) plus years, and Pam now operating her own business, all of which helps to crease [sic] stability and long security for [J.A.M. and E.R.M.].

* * * * *

15. Clear and convincing evidence was presented by the Father that Mother and William Trieloff have consistently tried to alienate the children from Father. . . . .

16. The Court further finds that although Mother clearly has issues that have been delineated in this Order, Father is controlling and often demeaning in his response to and communications with Mother. The Court has strong concerns that if Father is awarded sole custody he will become the alienating parent. The Court does not base the change of custody on school performance, quality of school corporations or teacher quality. . . . . The Court does find encouragement in the testimony from Pam's ex-husband who testified that he and Pam and [Father] have a very cordial relationship; that they readily communicate about his and Pam's children; that [Father] has never tried to interfere with his relationship with their children; and that [Father] has been very supportive of his continued involvement with his children. Evidence of this spirit of cooperation is evidenced by how well adjusted Pam's children are, and further evidenced by their extensive school and sport successes. There is no evidence for this Court to believe that the Father or Pam would encourage the children to lie to their Mother, or to keep secrets from her concerning future trips or other events.

* * * * *

CONCLUSIONS OF LAW

21. The Court incorporates by reference paragraphs one (1) through eighteen (20) [sic] of the Findings of Fact set out above herein as if fully set out here, and makes them a Conclusion of Law; and makes them an ORDER of this Court thereby awarding joint legal custody

> to the parties and physical custody of the parties' two (2) minor children to Father, James W. Meng.

(App. at 137-152.)

DISCUSSION AND DECISION

Ind. Code § 31-17-2-21(a) governs the modification of child custody orders. Under that section, the "court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8]." Ind. Code § 31-17-2-8 provides:

> The court shall consider all relevant factors, including the following:
> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian[.]

The modification of a custody order lies within the sound discretion of the trial court. *Haley v. Haley*, 771 N.E.2d 743, 747 (Ind. Ct. App. 2002). We will reverse a trial court's decision only on a showing of an abuse of discretion. *Id.* An abuse of discretion is found when the trial court's decision is clearly against the logic and effect of the facts

and circumstances. *Id.* We do not judge witness credibility or reweigh the evidence. *Id.* We consider only the evidence supporting the trial court's decision. *Id.* We accord "latitude and deference" to a trial court's decisions concerning modification of custody. *Nienaber v. Nienaber*, 787 N.E.2d 450, 455 (Ind. Ct. App. 2003).

1. Joyce Lowry

Mother asserts the trial court "erred when it admitted and relied upon the custody evaluation performed by Joyce Lowry." (Appellant's Br. at 7.) Mother argues Lowry is categorically barred from providing expert testimony under Ind. Code § 25-23.6-4-6, which provides: "A social worker licensed under this article may provide factual testimony but may not provide expert testimony." We disagree.

First, while Lowry is a licensed clinical social worker ("LCSW"), she is also a licensed marriage and family therapist ("LMFT"). Ind. Code art. 25-23.6 does not prohibit LMFTs from offering expert testimony. Therefore, the statute on which Mother relies does not prohibit Lowry from testifying as an expert.

Second, even if Lowry had not been an LMFT Ind. Code § 25-23.6-4-6 would not prohibit a trial court from finding she qualified as an expert. *See Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996) (When a statute and a rule of evidence promulgated by our Indiana Supreme Court conflict, the Supreme Court rule will prevail over the statute.) Ind. Evidence Rule 702 governs the admission of expert testimony. "If scientific, technical, or other specialized knowledge will assist the trier or fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

otherwise." Evid. R. 702(a). "The determination of whether a tendered witness is qualified to give an opinion as an expert is a matter lying within the sound discretion of the trial court. An expert may be qualified by practical experience as well as by formal training." *In re Adoption of L.C.*, 650 N.E.2d 726, 733 (Ind. Ct. App. 1995) (internal citations omitted), *reh'g denied*, *trans. denied*, *cert. denied sub nom Newman v. Worcester County Dept. of Social Svcs.*, 517 U.S. 1136 (1996). "No . . . advanced degrees or special recognitions or accomplishments are necessary to qualify as an expert." *Id.*

Lowry testified she is the director of Providence Guidance Center, a private "mental health practice, as well as a court-referred practice, with seven counties." (Tr. at 12.) Lowry has a master's degree in psychiatric social work with an emphasis in family counseling from Indiana University. She is a licensed clinical social worker, licensed marriage and family therapist, a registered mediator with the courts, and a parenting time coordinator. She has been a practicing social worker since 1982 and has been doing custody evaluations for nine years in Marion, Hendricks, Morgan, Johnson, Brown, Shelby, and Monroe counties. Lowry has been qualified as an expert witness for custody evaluations "probably . . . in the hundreds" of times. (*Id.* at 15.) She and her staff conducted the Meng custody evaluation.

Mother has not demonstrated the trial court abused its discretion in qualifying Lowry as an expert witness under Evid. Rule 702 and in relying on Lowry's report and testimony.

Mother also asserts the custody evaluation Lowry prepared was biased and unreliable. Father's counsel sent Lowry two letters in the spring of 2005. The letters provided information about setting up the custody evaluations with Father and his wife. The letters also listed several of Father's concerns about Mother and her behavior. Mother argues the letters were "detailed and specific in the accusations and were intended to persuade the evaluator." (Appellant's Br. at 13.)

Lowry testified that when she receives a letter from an attorney listing "bad things about the other party," (Tr. at 154), she typically does not pay attention to such information but looks primarily at the demographic information she needs for the file. Lowry indicated she had not read the letters closely until the night before the first evidentiary hearing, in January 2006, when she faxed them to Mother's counsel at his request. She denied using Father's allegations in the letters as an outline for her report. After hearing her testimony, the trial court considered Lowry's report and testimony "reasonable" and "credible." (App. at 140.) We decline the invitation to judge Lowry's credibility and reweigh the evidence. *See Haley*, 771 N.E.2d at 747.

2. Modification of Custody

Mother asserts the trial court's order was "clearly erroneous in that it failed to specifically state the factor that had changed over time." (Appellant's Br. at 17.) We disagree.

The trial court is not required "to specify which factor or factors has substantially changed." *Kanach v. Rogers*, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001). "Rather, the court must 'consider' the statutory factors and find there has been a substantial change."

Id. The trial court's recitation of the relevant statutes in its order indicates it considered each of these factors[1] in arriving at the conclusion a substantial change had occurred and a modification of custody would be in the best interests of the children. The trial court did not err.

CONCLUSION

The trial court did not abuse its discretion when it qualified Joyce Lowry as an expert. The trial court is required to consider certain factors when modifying a custody order but is not required to specify which factors have changed. The trial court did not err in modifying custody.

Affirmed.

MATHIAS, J., and NAJAM, J., concur.

[1] Mother argues the trial court failed "to consider the wishes of the children as emphasized by Richard Lawlor, Ph.D." (Appellant's Br. at 17-18.) The trial court listed the "wishes of the child" as one of the factors to consider when modifying custody, (App. at 138), and we therefore presume it considered this factor. Mother's reference to the children's wishes is another invitation to reweigh the evidence, which invitation we decline.